* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ Arb. P. No.34 of 2007

% Date of decision:23.05.2007

MR. SATINDERJIT SINGH & ANR. ...PETITIONERS
Through: Mr. Bishwajit Bhattacharya, Sr. Adv.
with Mr. Sumant &
Mr. Sudarshan Raja, Advocates

Versus

MR. SANTOSH KAPOOR ...RESPONDENT
Through: Mr. Subodh Markandeya, Sr. Adv.
with Ms. Rifat Ara, Advocate

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

1. Whether the Reporters of local papers may be allowed to see the judgment? No
2. To be referred to Reporter or not? No
3. Whether the judgment should be reported in the Digest? No

SANJAY KISHAN KAUL, J. (Oral)

1. The present petition has been filed by the petitioners under Section 11(4)(b) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the said Act). The dispute arises out of an Agreement to sell dated 1.9.2005 in terms whereof the respondent agreed to sell the leasehold property consisting of a residential flat on the second floor of plot bearing No.60, Pocket-II, Jasola, New Delhi with 2/3rd roof rights with proportionate rights in land measuring 260 sq.yds. for a total consideration of Rs.84,50,000.00. It is not in dispute that out of the said

amount the petitioners have paid an amount of Rs.36.50 lakh, which was duly encashed by the respondent. It may be noted at this stage that subsequently the disputes arose between the parties and the respondent sent a refund cheque to the petitioner for Rs.31.50 lakh, which has not been encashed by the petitioners.

2. The petitioners claimed that there is an arbitration clause in the Agreement between the parties being clause No.15, which is as under:

> "15. That in case of any dispute, differences arising between the two parties Mr. Rajat Dua S/o Mr. S.L. Dua and Mr. Sandeep Mohindra will be the arbitrators from both sides and their decisions will be binding on both the parties."

3. It is also the case of the petitioners that a communication dated 1.12.2006 was addressed by the respondent to the aforesaid to named arbitrators in the following terms:

> "Dear Sirs,
>
> You were appointed Arbitrators as per agreement dated 1.9.05 executed between myself on one side and Mr. Satinderjit Singh and Mrs. Inderjit Kaur on other side. A dispute has arisen between the parties and I am requesting your goodselves to enter into the reference of the disputes and decide the same after appointing an Umpire or third arbitrator on which you both mutually agree.
>
> I shall file my statement of claim against Mr. Satinderjit Singh and Mrs. Inderjit Kaur as I have suffered huge losses on account of untimely payment made by them."

4. Simultaneously the respondent address a letter of the even date to the petitioners setting out what were alleged to be the defaults on the part of the petitioners in complying their obligations under the Agreement to Sell

dated 1.9.2005. Last line of the said letter states:

> "Now that you have violated the agreement and decision taken on 19.11.06 and since a dispute has arisen, I have referred the matter to Arbitration as per the agreement dated 1.9.06."

5. In view of the respondent having invoked the arbitration clause, the petitioners also addressed a letter dated 5.2.2006 to the two named arbitrators requesting for the appointment of the umpire/third arbitrator in view of the urgency of the matter. Similarly the respondent also addressed a letter dated 7.12.2006 to the two arbitrators calling upon them to appoint the third arbitrator/umpire and suggested three names for appointment of such third arbitrator.

6. The petitioners were apprehending that the respondent may deal with the suit property and thus filed OMP No.571/2006 under Section 9 of the said Act before this Court in which ex parte orders were passed on 8.12.2006 restraining the respondent from creating any third party interest in the suit property. This petition was disposed of vide order dated 15.12.2006 where the statement of both the counsels for the parties were recorded that the arbitral tribunal has already been constituted and is in the process of deciding the name of the umpire/third arbitrator. The parties were given liberty to approach the arbitral tribunal for any interim relief in view thereof and the interim orders were directed to be continued till such appointment of the arbitrator and consideration of the application. The petition was disposed of.

7. The necessity for filing the present petition has arisen on account of the fact that no name of the umpire/third arbitrator has been finalised and the

petitioner is in urgent need to settle the dispute as also on account of the interim relief claimed for by the petitioner.

8. Reply has been filed to the petition and the sub-stratum of the reply is that the arbitration clause in the original agreement cannot be said to have come into existence in view of the fact that there are a lot of cuttings. This is so since the original clause 15 was different. It was scored out and substituted by another clause in hand, which has been extracted aforesaid. The respondent, thus, denies the arbitration clause in the Agreement to Sell and it is stated that the said Agreement at best can be assumed only to be a draft. The receipt of payment of Rs.36.50 lakh has, however, been admitted.

9. Learned counsel for the petitioner has drawn the attention of this Court to the provisions of Section 11 (4) of the said Act, which reads as under:

> "**11. Appointment of arbitrators.**
> ....
> (4) If the appointment procedure in sub-section (3) applies and -
> (a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or
> (b) the two appointed arbitrators fail to agree on the third arbitrator within 30 days from the date of their appointment,
> the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him."

10. Learned counsel submits that the present case is one where the two appointed arbitrators have failed to agree on the third arbitrator within the stipulated period of thirty (30) days and thus the third arbitrator has to be appointed by this Court. Learned counsel submits that it is not open for

the respondent to now contend that there was uncertainty about the arbitration clause, the respondent herself having invoked the arbitration clause. Learned counsel has also referred to the provisions of Section 4 of the said Act, which read as under:

> "**4. Waiver of right to object. -** A party who knows that -
> (a) any provision of this Part from which the parties may derogate, or
> (b) any requirement under the arbitration agreement,
> has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object."

11. Learned counsel, thus, submits that in the alternative even if it be assumed that there is any defect in the arbitration clause the actions of the respondent would amount to consent to arbitration within the aforesaid provision. Learned counsel also seeks assistance from the provisions of Section 7(4) of the said Act, which reads as under:

> "**7. Arbitration agreement. -**
> ....
> (4) An arbitration agreement is in writing if it is contained in -
> (a) a document signed by the parties;
> (b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or
> (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other."

12. Learned counsel submits that apart from a document signed by the parties containing an arbitration clause arbitration can be resorted to even by exchange of letters and communications. This is also happened in the

present case apart from the arbitration clause contained in the Agreement to Sell dated 1.9.2005.

13. Learned counsel for the respondent has reiterated the pleas as contained in the reply and has further drawn the attention of this Court to the definition under Section 2(b) of the said Act, which reads as under:

> "**2. Definition. -**
> ....
> (b) "arbitration agreement" means an agreement referred to in section 7;"

14. Learned counsel for the respondent thus contends that an arbitration agreement can be said to have come into force only if it is in accordance with the provisions of Section 7 of the said Act.

15. On hearing learned counsels for the parties, in my considered view, the present petition is liable to be allowed. There is no doubt that there are cuttings in the original agreement dated 1.9.2005 containing the arbitration clause. The new clause is hand written. However, the existence of the said clause can really not be doubted in view of the communications of the respondent which are undisputed. It is the respondent who invoked the said arbitration clause addressing the communication to the two named arbitrators in terms of letter dated 1.12.2006 and also informing the respondent by another letter of the even date. The petitioner also issued letters to the arbitrators. Both the parties wrote letters to the arbitrators for appointment of the third arbitrator but the third arbitrator was not appointed. It can hardly be said that there are any uncertainly about the existence of the arbitration agreement. The present petition is one where the arbitration clause is hand written and

communications were exchanged between the parties leaving no manner of doubt about the intent of the parties to agree to the arbitration and thus on both accounts sub-section (4) of Section 7 read with Section 2(b) of the said Act are satisfied.

16. I also find force in the contention of the learned counsel for the petitioners that the respondent has waived any right to object to this arbitration in view of communications and the provision of Section 4 as contained aforesaid.

17. I am thus of the considered view that the third arbitrator is liable to appointed by this Court in view of the Agreement to sell, the communication between the parties and in view of the failure of the arbitrators to appoint the third arbitrator.

18. Learned counsels for the parties suggested the name of Justice R.C. Chopra (Retd.) to be appointed as the third arbitrator. Ordered accordingly.

19. The fee of the third arbitrator will be fixed by the third arbitrator himself to be shared equally between the parties.

20. The petition is allowed leaving the parties to bear their own costs.

21. A copy of the order be sent to the arbitrator.

MAY 23, 2007 SANJAY KISHAN KAUL, J.
b'nesh